Filed 11/6/12 In re D.Y. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.Y., a Person Coming Under the Juvenile Court Law.	B237374 (Los Angeles County Super. Ct. No. CK57750)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DAMION Y., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Affirmed.

Thomas S. Szakall, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father, Damion Y., appeals from a dependency court order sustaining jurisdictional allegations that his son, D.Y., is a person described by Welfare and Institutions Code section 300[1] (section 300) and placing Father and D.Y. under the supervision of DCFS for six months pursuant to section 360, subdivision (b). Father contends there is no substantial evidence that his son suffered or is at substantial risk of suffering serious physical harm such that he falls within section 300, subdivision (b). We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Background[2]

Minor D.Y. came to the attention of the Department of Children and Family Services (DCFS) in June 2011 when he was five years old and living with Father. D.Y. had been in Father's custody since he was two weeks old, and had little contact with his mother, who is not a party to this appeal.

On the morning of June 10, 2011, Father's neighbor in their shared apartment complex called the Long Beach Police Department and reported that Father had just choked her and threatened her with a baseball bat while she was outside getting her children off to school. Officer Harrison Moore and another officer went to Father's apartment and asked him to come outside to speak with

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[1] All subsequent undesignated references to code sections are to the Welfare and Institutions Code.

[2] We limit our discussion of the record to those facts and issues that are pertinent to our holding.

them about the incident. Father denied that he touched the neighbor, and said they had a verbal altercation in which they cursed at each other.

While standing outside Father's apartment, Officer Moore observed a marijuana plant on the window sill. Officer Moore also had a view into the apartment, because the front door was open. He saw what appeared to be a black semi-automatic handgun inside on a table. Having been informed that Father's five-year-old son was inside the apartment, Officer Moore entered to remove the child from the vicinity of the unsecured firearm. Once inside, he observed a vodka bottle containing live ammunition. He also observed two bottles and a Ziploc baggie filled with marijuana, and a large Ziploc bag containing marijuana and marijuana stems. The police observed that these marijuana products, and the marijuana plant on the sill, were in "plain view" and "within easy access" of D.Y., who was eating breakfast less than five feet away from them.

Father was arrested for assault and child endangerment. Felony charges were filed against him for making criminal threats and assault with a deadly weapon (a baseball bat). No weapons charges were brought because the gun found in his home turned out to be a pellet gun, and Father was not charged with child endangerment. D.Y. was taken into protective custody and eventually placed with his paternal aunt while Father was in county jail awaiting trial. Ultimately, Father was convicted of making criminal threats.

A DCFS caseworker interviewed D.Y. and asked him if Father ever left him alone. D.Y. responded that Father sometimes would leave him alone for "eight minutes" to go "around the corner to the store." In response to questions, D.Y. stated that he knew what drugs were and had observed Father abusing drugs. When asked what kind he had seen Father abuse, D.Y. stated, "I forgot. I do not

know." He said he knew what marijuana looks like, although he responded that he did not know if he had ever witnessed Father smoking it.

Father had a medical marijuana prescription and received disability benefits based on his physical ailments. Father admitted smoking marijuana in his home for medicinal purposes, but denied doing so in front of D.Y. He had told D.Y. that marijuana "is daddy's medicine" and said D.Y. "knows not to touch it." He said that when he needed to smoke marijuana, he would either send D.Y. outside or to his room and tell him to close the door. Father further stated, "If I was medicating (smoking marijuana) and my son came in the room, I would tell him to get out of the room as daddy's smoking."

Father reported that in the morning he would split his medical marijuana doses into two or three baggies that he could take with him when he went out to run errands, so that he could medicate himself even when he was out. He further stated that he regularly prepares these daily doses of marijuana while D.Y. is eating breakfast. Father also stated that he had recently begun to experiment with making "edibles" with marijuana. He said some marijuana stems were found on the floor in his house on the morning of his arrest because he was about to grind some of the stems to make his edibles. Father indicated that he boiled marijuana stems in his crockpot to render the THC from the marijuana; from this, he could make tea and cookies infused with THC. He stated that he did not make these products when D.Y. was at home and nor did he keep them at home, and he kept the marijuana in a jar in a cabinet to which D.Y. does not have access.

With respect to the ammunition in his apartment, Father stated that he kept the bullets to remind him of a deceased friend he used to go hunting with. The vodka bottle in which the bullets were kept was the last bottle his friend drank from.

D.Y.'s kindergarten teacher reported that D.Y. was very well behaved and respectful, and was usually clean and neatly dressed. The child earned good grades and excellent marks for his effort in all categories. She stated that Father seems to care very much for the child. Although she could not say whether Father ever appeared to be under the influence of marijuana, some people at school had noticed a smell of marijuana after Father left. DCFS also interviewed several paternal aunts, who reported they did not have any concerns about Father's ability to parent D.Y. and had not observed him abusing drugs or alcohol in front of D.Y.

Following Father's release from jail, he submitted to random drug testing and tested positive for marijuana. He had renewed his medical marijuana card.

Procedural Background

DCFS filed a dependency petition alleging two counts as to Father[3] under section 300, subdivision (b). First, the petition alleged that Father "created a detrimental and endangering home environment for the child in that the father possessed marijuana plants and ammunition in the child's home within access of the child. . . . Such a detrimental and endangering home environment established for the child by the father endangers the child's physical health and safety and creates a detrimental home environment, and places the child at risk of physical harm, damage and danger." Second, it was alleged that Father "has a history of illicit drug abuse and is a current user of marijuana, which renders the father incapable of providing regular care of the child. On numerous prior occasions the

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[3] We do not discuss additional counts alleged as to the mother based on her alleged failure to provide for D.Y., as those counts ultimately were not sustained and the issues as to the mother are not at issue here.

father possessed, used and was under the influence of marijuana while the child was in the father's care and supervision."

At the detention hearing, D.Y. was ordered detained and was subsequently placed with a paternal aunt. Two months later, he was ordered returned to Father following Father's release from custody and the court's determination at the pretrial resolution conference that such placement was suitable.

At the contested adjudication hearing, the court received into evidence, without objection, the following: (1) a July 13, 2011 Jurisdiction/Disposition Report; (2) an August 15, 2011 Interim Review Report; and (3) a September 21, 2011 Interim Review Report. No other evidence was presented. In closing arguments, D.Y.'s counsel joined with both parents' counsel in asking for dismissal of the petition. DCFS, however, argued that the court should find true the allegation that Father endangered D.Y.'s physical safety by leaving marijuana in places in the home that were easily accessible to D.Y. DCFS advocated that rather than naming D.Y. a dependent child of the court, the court should proceed under section 360, subdivision (b), and order the child returned to Father subject to DCFS supervision for a defined period of time.

The court found true the count in the dependency petition alleging that Father "created a detrimental and endangering home environment for the child in that the father possessed marijuana plants and ammunition in the child's home within access of the child." The court thus found that D.Y. was a person described by section 300, subdivision (b). The court dismissed the other counts in the petition. Rather than declaring D.Y. a dependent, the court ordered that D.Y. remain with Father, with services to be provided by DCFS to help the family remain together and with DCFS supervising the family for a period of six months. (§ 360, subd. (b).)

Father timely appealed.

DISCUSSION

Father contends that the juvenile court erred in finding that D.Y. is a person described by section 300, subdivision (b).[4] "On appeal from an order making jurisdictional findings, we must uphold the court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value." (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) Any inferences we draw must be reasonable and logical; "'inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394.)

In order for a court to find that a child is one who is described by section 300, subdivision (b), DCFS must establish that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to

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[4] The order for informal supervision under section 360, subdivision (b) is the equivalent of a dispositional order, an appealable order from which jurisdictional findings are subject to review. (*In re Adam D.* (2010) 183 Cal.App.4th 1250, 1260–1261.)

provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." (§ 300, subd. (b).)

There is no evidence in the record that D.Y. has suffered any serious physical harm or illness. In the absence of any evidence of past harm suffered by the children, we examine whether DCFS has shown by a preponderance of the evidence that there is a "substantial risk that the child will suffer, serious physical harm or illness." (§ 300, subd. (b).) Our focus is whether DCFS has proffered substantial evidence that "at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future." (*In re Savannah M., supra*, 131 Cal.App.4th at p. 1396.) We conclude that substantial evidence establishes that Father's conduct created a substantial risk that D.Y. would ingest marijuana, and thus suffer serious physical harm.

In re Rocco M. (1991) 1 Cal.App.4th 814, is instructive. In that case, the court found that the dependency court reasonably could find a substantial risk of serious physical harm to an 11-year-old Rocco from the fact that Rocco's mother "created the danger that Rocco would ingest hazardous drugs." (*Id.* at p. 825.) Starting from the premise that "a child's ingestion of illegal drugs constitutes 'serious physical harm' for purposes of section 300," (*ibid.*) the court concluded that Rocco's mother created a substantial risk that he would ingest drugs "in four distinct ways: (1) by placing or leaving drugs in a location or locations where they were available to Rocco; (2) by frequent and prolonged absences which created the opportunity for Rocco to ingest the drugs; (3) by neglecting Rocco's needs in a way which might be reasonably expected to create the kind of emotional and psychological conditions in which substance abuse typically thrives; and (4) by exposing Rocco to her own drug use, thus impliedly approving such conduct and

even encouraging him to believe that it is an appropriate or necessary means of coping with life's difficulties." (*Ibid.*)

In this case, D.Y. stated that he knew what drugs were and had observed Father abusing drugs. Although he said he did not know if he had ever witnessed Father smoking marijuana, he knew what marijuana looks like. Father admitted smoking marijuana in his home, but denied doing so in front of D.Y. However, since Father admitted he told D.Y. that the marijuana "is daddy's medicine" and that he told D.Y. "not to touch it," D.Y. obviously had seen marijuana in the home and knew that Father ingested it.

Moreover, on the day of Father's arrest, the police observed D.Y. eating a bowl of cereal less than five feet away from places where marijuana and marijuana stems were sitting out in the open in multiple clear containers. Father admitted that he routinely prepared his medical marijuana doses for the day while D.Y. was eating breakfast. Father also reported that he had recently started to experiment with making "edibles" with marijuana, and would boil marijuana stems in his crockpot so that he could make tea and cookies infused with THC. Although he stated he did not make these products when D.Y. was at home, he admitted that on the morning of his arrest he was in the process of grinding marijuana stems when he was interrupted by the neighbor with whom he had the altercation. D.Y. was home at the time. Thus, substantial evidence shows that marijuana was present in the home and was kept within D.Y.'s reach. (Cf. *In re W. O.* (1979) 88 Cal.App.3d 906, 910 [reversing order removing child from parents' home based on presence of cocaine and marijuana in the home where it was undisputed that parents kept drugs in places beyond the reach of the two-year-old child].)

Unlike *In re Rocco M.*, there is no evidence that Father neglected his son or frequently left him for prolonged lengths of time. However, D.Y. reported that

Father would sometimes leave him at home for short periods of time while he went to the store. Further, Father had impliedly condoned the use of marijuana by teaching D.Y. that it was "daddy's medicine." This record demonstrates a substantial risk that when D.Y. was left at home alone, with marijuana readily accessible, the five-year old might decide to try his father's "medicine" and ingest marijuana.

Father continued to test positive for marijuana after his release from jail, and renewed his medical marijuana card. Thus, substantial evidence supports the court's determination that as of the jurisdictional hearing, a substantial risk remained that D.Y. could ingest marijuana at his home and thereby suffer serious physical injury.

Our analysis is not affected by the fact that Father's marijuana use may have been legal under the Compassionate Use Act of 1996, which protects patients who use marijuana for medical purposes from criminal prosecution. "[L]egal use of marijuana can be abuse if it presents a risk of harm to minors." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452; see Health & Saf. Code, § 11362.5, subd. (b)(2) ["Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others"].) Father has a responsibility to ensure that D.Y. does not have access to marijuana in his home.

We thus affirm the finding that D.Y. is a child described by section 300, subdivision (b), based on the fact that marijuana was kept in D.Y.'s home and was readily accessible to him.

DISPOSITION

The order is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.